Office - Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS.
CLERK

84-1533

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term 1984

ESTELLA JARAMILLO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lloyd Charton
17480 E. 17th Street
Tustin, California 92680

Attorney for Petitioner
Counsel of Record

NO._____

SUPREME COURT OF THE UNITED STATES

October Term 1984

ESTELLA JARAMILLO,	)
	)
Petitioner	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent	)
	)

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lloyd Charton
17480 E. 17th Street
Tustin, California 92680

Attorney for Petitioner
Counsel of Record

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. WHETHER THE DOUBLE JEOPARDY CLAUSE BARS THE PETITIONER'S RETRIAL WHEN THE JUDGE'S MISTRIAL ORDER WAS PROMPTED BY NEWS OF HIS INDICTMENT BY A FEDERAL GRAND JURY.

TABLE OF CONTENTS

	Page
Cover	
Question Presented	
Table of Contents	
Table of Authorities	
Prayer for Relief	1
Opinion Below	2
Ground for Jurisdiction	2
Constitutional Provisions, Statutes	2-8
Statement of the Case	9
Argument	13
I. Double Jeopardy Precludes the Retrial of Estella Jaramillo	13
A. Indictment of a Presiding Trial Judge Does Not Constitute Manifest Necessity	17
B. It Neither Is Manifest Necessity nor a Requirement of Title 28 USC 455(a) for Judge Claiborne to Declare a Mistrial	25
II. The Failure to Apply or Even Consider Fed.R.Crim.P. Rule 25 Bars a Retrial	33
Conclusion	41

TABLE OF AUTHORITIES

1. Benton v. Maryland 359 US 784 (1969) 13
2. Green v. United States 355 US 184 (1957) 13
3. United States v. Perez 9 Wheat 576 (1824) 15
4. Wade v. Hunter 336 US 684 (1949) 16
5. Arizona v. Washington 434 US 497 (1978) 17, 20
6. Windsor v. Queen LR 1 QB 289, 305 (1866) 17
7. Downum v. United States 372 US 734 (1963) 17
8. United States v. Jorn 400 US 869 (1971) 18, 19
9. Illinois v. Summerville 410 US 469 (1973) 19
10. United States v. Will 449 US 213 (1980) 26
11. Philadelphia v. Fox 64 Pa. 169 (1870) 26
12. Mitchell v. Sage Stores Co. 157 Kan 622 (1953) 27
13. Pilla v. American Bar Association 542 F.2d 56 (1976) 28
14. Atkins v. United States 556F.2d 1028 (1077) 28
15. Brinkley v. Hanig 83 F.2d 351 (1936) 28
16. Edwards v. United States 334 F.2d 360 (1964) 31
17. Potashnick v. Port City Construction Co. 609 F.2d 1101 (1979) 31
18. United States v. Coven 662 F.2d 162 (1981) 32
19. Blizard v. Frechette 601 F.2d 1217 (1979) 32
20. United States v. Sartori 560 F.Supp. 427 (1983) 35
21. Bennett v. United States 285 F.2d 567 (1960) 35
22. Coleman v. US 334 F.2d 558 (1964) 36

23. Hvass v. Graven 257 F.2d (1958) 37
24. Harris v. Young 607 F.2d 1081 (1979) 37

STATUTES

1. 38 USC 455(a) 25
2. Code of Judicial Conduct, Canon 2 25
3. Federal Rules of Criminal Procedure Rule 25 33

CONSTITUTION

1. 5th Amendment of United States Constitution
2. 14th Amendment of United States Constitution

NO._____

SUPREME COURT OF UNITED STATES

October Term 1984

ESTELLA JARAMILLO,	)
	)
Petitioner	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent	)
	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ESTELLA JARAMILLO, respectfully prays that a write of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the United States Diectict Court's holding that the indictment of a trial judge constituted manifest necessity warranting the declaration of mistrial and therefore the retrial of petitioner was not barred.

OPINIONS BELOW

The citation of the opinion of which review is sought in this court is United States v. Jaramillo 745 F.2d 1245 (1934).

JURISTICTION

Petitioner invokes the jurisdiction of this Court under 38 USC Section 1254 (1) on the ground that her rights under the Fifth Amendment to the United States Constitution were violated.

The United States Court of Appeals for the Ninth Circuit entered its order rejecting petitioner's 5th Amendment claim on October 23, 1984.

The instant Petition for Writ of Cestiorari is filed within 60 days of the order.

CONSTITUTIONAL PROVISION AND STATUTES

AMENDMENT V

No person shall be held to answer

for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE 25. JUDGE; DISABILITY

(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting

in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties becuase he did not preside at the trial, or for any other reason, he may in his discretion grant a new trial. As amended Feb. 28, 1966, eff. July 1, 1966.

SECTION 455. DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by

the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree o- relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal

financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affaris of a party, except that:

(i) Ownership in a mutual or

common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

STATEMENT OF THE CASE

Appellant ESTELLA JARAMILLO was one of four individuals indicted on July 20, 1983 by the Federal Grand Jury, District of Nevada in a two count Indictment charging them with violations of the Controlled Substances Act, especially Title 21 of United States Code, Section 841(a)(i), Title 18 Section 2 and Title 21 United States Code Section 846.

ESTELLA JARAMILLO was tried on these counts beginning December 6, 1983 (after two previous adjournments), before the Honorable Harry E. Claiborne. Court convened on December 6, 1983, at 9:35 a.m. for jury selection, which selection continued through December 7, at which time a jury was finally selected, duly sworn and impaneled. Both the government and the defense made opening statements. The government called four witnesses and

introduced evidence. According to the United States District Attorney charged with trying the case, the Government was about halfway through the Government's case. (Transcript January 12, p. 10, line 9), when Judge Claiborne was indicted.

On December 8, court convened at 9:39 a.m., additional evidence was heard until 10:45 a.m. After a short recess, the Government introduced evidence until 11:55 a.m. when the Court recessed for lunch. Court then reconvened at 1:30 p.m., at which point Judge Claiborne informed the prosecutor and the defense attorney in chambers that he did not have any alternative but to declare a mistrial in this case because he received word that the Reno Grand Jury indicted him on seven counts. (Transcript December 8, p. 1, line 6). Judge Claiborne told both

prosecutor and defense attorney that it is what he intended to do so that they would know in advance (Transcript December 8, line 7). Judge Claiborne then called in the jury and told them "Ladies and gentlemen of the jury, I regret to advise you that I have been advised that I have been indicted by a grand jury in Reno. By reason of that fact, it would be inappropriate for anybody to preside in a trial who is under indictment. For that reason, I am declaring a mistrial in this case." (Transcript December 8, p. 1 lines 15-19). The judge then reset the case for February 13 at 9:30 a.m. (Transcript December 8, p. 1, line 25). He told both attorneys that he was sorry, he knew that they were all ready to go, but he just could not help it. (Transcript December 8, p. 2, line 3). The court then recessed.

On January 9, 1984, Petitioner moved to bar retrial pursuant to the United States Constitution Fifth Amendment, barring Double Jeopardy.

On March 19, 1984, Petitioner Jaramillo argued the Motion to Bar Retrial before the Honorable Roger D. Foley.

On March 20, 1984, Judge Foley issued an order denying the Motion to Bar Retrial. Petitioner filed a Motion for a Stay Pending Appeal which was granted and filed an appeal to the Ninth Circuit. (Exhibit A, B)

On September 13, 1984, a panel of the Ninth Circuit heard oral argument on petitioner Jaramillo's appeal.

On October 23, 1984, the Ninth Circuit issued its decision denying the appeal of petitioner Jaramillo. (Exhibit C)

The matter was reset for trial

on December 12, 1984. On December 6, 1984, at calendar call, Petitioner moved the District Court for a Stay Pending a Writ of Certiovari to the United States. The Court granted the stay and ordered that the December 12, 1984, trial be vacated. (Exhibit D)

ARGUMENT

I

DOUBLE JEOPARDY PRECLUDES THE RETRIAL OF ESTELLA JARAMILLO

The Fifth Amendment of the United States Constitution states that "No person shall be subject for the same offense to be put twice in jeopardy of life and limb. This provision has been made binding upon the states, under the due process clause of the Fourteenth Amendment," Benton v. Maryland 395 U.S. 784 (1969).

As held in Green v. United States

355 U.S. 184 (1957):

> "The constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense....The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

Jeopardy had already "attached" in this case since the jury was impaneled and the government was already half way through its case. The issue then is whether the abrupt declaration of mistrial by Judge Claiborne after his being informed of his indictment, would bar

Petitioner's retrial under the Double Jeopardy Clause.

The fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objection is United States v. Perez 9 Wheat 576, 6L ed 165 (1824). Mr. Justice Story, writing for a unanimous court set forth the standards for determining whether a retrial, following a declaration of a mistrial constitutes double jeopardy within the meaning of the Fifth Amendment.

> "We think that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere.

> To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes...." Id at 580, 6 LFd 165.

The United States Supreme Court has consistently followed the Perez formulation in subsequent decisions and the court repeatedly abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in varying circumstances. In Wade v. Hunter 336 U.S. 684, 93 L Ed. 974 (1949) the court reaffirmed the flexible standard and wrote:

> "....Such a rigid formula is inconsistent with the guiding principles of the Perez decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances without

> injury to the defendants or to the public interest." (Emphasis added) Id., at 691, 93 L Ed. 974.

(A) INDICTMENT OF A PRESIDING TRIAL JUDGE DOES NOT CONSTITUTE MANIFEST NECESSITY

This is a case of first impression and its factual context is unprecedented in the history of American juris prudence. Supreme Court decisions finding for or against "manifest necessity" for a trial judge's declaration of mistrial have never been in the context of an indictment of a presiding trial judge occurring right in the middle of a criminal trial.

In Arizona v. Washington 434 US 497 (1978), the court clarifies the concept of "manifest necessity":

> "Whether the phrase 'manifest necessity,' 'evident necessity' see Windsor v. Queen LR 1 QB 289, 305 (1866) or 'imperious necessity' see Downum v. United States 372 US 734, 736, is used, the meaning is apparently the same." Id. at 728 footnote 17.

"....We assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." Id at 729. Thus as a constitutionally protected interest is inevitably affected by any mistrial decision, the trial judge therefore, "must always temper the decision whether or not to abort trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. United States v. Jorn 400 US, at 486 27L Ed. 2d 543 (Harlan J). In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion'

in declaring the mistrial. Thus, if a trial judge acts irrationally or irresponsibly, his action cannot be condoned. (Emphasis added) Arizona v. Washington (supra) at 514 citing United States v. Jorn (supra); Illinois V. Summerville 410 US, at 469 (1973).

In United States v. Jorn (supra), the judge did not believe that a taxpayer witness for the Government had been warned of his constitutional right against compulsory self incrimination by the Internal Revenue Service who first contacted him. When the judge found out that the remaining four witnesses were "similarly situated," the judge declared a mistrial. The court sustained the plea in bar of double jeopardy to an attempted second trial of the defendant. The court emphasized the important to the defendant of proceeding

before the 1st jury sworn, and concluded:

> "It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of mistrial. United States v. Perez 9 Wheat, at 580. Therefore we must conclude that in the circumstances of this case, Appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment." 40 US at 487, 27 L Ed. 2d 543 (Emphasis added).

The same requirement for the trial judge to exercise "sound discretion" is reinterated by United States Supreme Court in Arizona v. Washington (supra). In that case, defense counsel aired

improper and highly prejudicial evidence before the jury. The trial judge did not act precipitously in response to the prosecutor's request for a mistrial. "On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding....The mistrial order is supported by the high degree "of necessity which is required in a case of this kind." Id at 576. (Emphasis added.)

In the present case, similar to Jorn, Judge Claiborne's decision to

declare a mistrial can at best be described as being very abrupt. In the transcript of the oral argument on the motion to bar retrial p. 15 line 24, defense counsel pointed out that from the time both prosecutor and defense attorney went into chambers to be told by Judge Claiborne that he will declare a mistrial in light of his indictment, to the time where he walked out to call the jury in, there had been approximately three (3) minutes. During these three minutes neither the prosecutor nor the defense attorney had the time to say anything. Definitely, the opportunity was not provided by Judge Claiborne to discuss alternatives to mistrial or continuance. The record clearly showed that both counsels were summoned into chamber to receive the news of the mistrial announcement. Judge Claiborne stated that "I

regret to advise you that I have just received word that the Reno Grand Jury has indicted me on seven counts, so I don't have any alternative but to declare a mistrial in this case. I am sorry. I wanted you to know in advance that is what I intend to do." There was a total lack of responsible deliberation, taking into careful consideration Appellant's interest in having the trial concluded in a single proceeding. The judge did not evidence any concern, either, for double jeopardy consequences resulting from his decision to declare a mistrial. It was undoubtedly extremely traumatic for Judge Claiborne to receive news of his indictment, but a decision based on the impact of the news on his personal life was not the "sound discretion" required of judges in mistrial cases with double jeopardy consequences.

What was missing in the sua sponte declaration of mistrial was the "high degree of necessity" required of this type of case.

The Court of Appeals was greatly impressed by the "extraordinary circumstance" that had befallen Judge Claiborne and Petitioner JARAMILLO. In the court's view, there is no alternative but to give great deference to the decision of Judge Claiborne.

The extraordinary circumstance in this case cannot be used to cloud or justify the constitutional infirmity inherent in the judge's decision to declare a mistrial. Upholding the mistrial would set a negative precedence whereby a judge's personal disability may always be used to bypass the double jeopardy bar. This is one exception which can potentially swallow the double jeopardy

rule. The Court should not allow this to happen.

B. IT NEITHER IS MANIFEST NECESSITY NOR A REQUIREMENT OF TITLE 38 USC SECTION 455(a) FOR JUDGE CLAIBORNE TO DECLARE A MISTRIAL

The Government's position is that the mistrial is necessary because the judicial canons of ethics[1] and Title 28 USC Section 455(a)[2] mandate Judge Claiborne to withdraw from Appellant Jaramillo's trial. Judge Claiborne so stated:

> "It would be inappropriate for anybody to preside in a trial who is under indictment."

No matter how commendable Judge Claiborne's decision was in light of the

---

[1] Code of Judicial Conduct, Canon 2. "A judge should avoid Impropriety and the Apperance of Impropriety in all his activities.

[2] 28 USC Section 455(a): This section provides in relevant part: (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which impartiality might reasonably be questioned.

of the traumatic event that befell him, the safekeeping of the integrity of the judicial office cannot be the sole consideration at the exclusion of the Appellant's constitutional right to have the charges against her properly adjudicated.

In federal courts, generally when an individual judge is disqualified from a particular case by reason of Section 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified. However, it is settled law that sometimes the ancient rule of necessity prevails over the disqualification standards of Section 455.

As explained in United States v. Will 449 US 213 (1980), the Rule of Necessity had its genesis at least five and a half centureis ago. Pollack

accurately stated the well-settled principle of common law;

> "Although a judge had better not, if it can be avoided, take part in the decision of a case in which he has a personal interest, yet he not only may, but must do so if the case cannot be heard otherwise." F. Pollack, A First Book of Jurisprudence 270 (6th Ed. 1929)

The Rule of Necessity has been consistently applied in this country in both state and federal courts. In Philadelphia v. Fox 64 Pa. 169 (1870) the Supreme Court defined:

> "The true rule unquestionably is that whenever it becomes necessary for a judge to sit even where he has an interest--where no provision is made for calling another in, or where no one else can take his place, it is his duty to hear and decide, however disagreeable it may be." Id. at 169 (Emphasis added).

In State ex rel Mitchell v. Sage Stores Co. 157 Kan 622 (1943) the Supreme Court held:

"It is well established that actual disqualification of a member of a court of last resort will not excise such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question properly presented to such court, adjudicated." Id, at 629 (Emphasis added)

Federal courts also have recognized the rule.[3] In United Stats v. Will (supra) the Supreme Court noted that in enacting Section 455 the House and Senate Committees constantly assume that upon a disqualification of a particular judge, another would be assigned to the case.

"If there is any reasonable factual basis for doubting

---

[3] E. G. Atkins v. United States 214 Ct D. 164, 556F.2d 1028 (1977), Pike v. American Bar Association 542 F.2d 56 (CA 8 1976), Brinkley v. Hassig 83F 2d 351 (CA 10 1936) United States v. Carrigan 401 F. Supp. 795 (Wyo 1975)

> the judge's impartiality he should disqualify himself and let another judge preside over the case." S Rep. No. 93-419 p. 5 (1973) (Emphasis added); M.R. Rep. No. 83-1453 p. 5 (1973) (Emphasis added), U.S. Code Congress and Admin. News 1974 p. 6357.

The court in Will also remarked that there was no hint of any congressional intent of altering the ancient Rule of Necessity, a doctrine so far unquestioned by any prior judicial disqualifying statues. Thus, the Will court deduced that:

> "The declared purpose of Section 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum." Id. at 217.

Clearly, in this case, Judge Claiborne's declaration of a mistrial as a result of his indictment is not man-

dated by Section 455. Both the statute and the Rule of Necessity would require the judge to stay on the bench and finish the trial so that Appellant's constitutional right to have the charges against her resolved would not be violated. As the government had so aptly pointed out, Judge Claiborne was the only district court judge available at that time. Senior Judge Foley was handling only a limited civil case load. Thus, it is Judge Claiborne's duty, where no one else can take his place, to hear and decide Appellant's case.

The Court of Appeals, urged by the government held that since Will, Congress amended Section 455(a) to do away with the "duty to sit" doctrine. It is correct that there is no longer any "duty to sit" doctrine; however the amendment by Congress occurred in 1974

six years prior to Will.

Under the prior version of Section 455, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a "duty to sit." See Edwards v. United States 334 F. 2d 360, 362 n. 2 (5th Cir, 1964) cert denied 379 US 1000 (1965). Since 1974, Section 455(a) provides that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." (Emphasis added) The use of "might reasonably" in the new Section 455(a) was held by one court of appeals to mandate that a judge should err on the side of caution, and disqualify himself in a questionable case. Potashnick v. Port City Construction Co. 609F.2d 1101, 1111 (5th Cir) cert denied 449 US 820 (1980). Thus, it is well settled that

with the new 455(a), a duty to sit no longer exists. See United States v. Coven 662 F.2d 162, 168 (2d Cir 1981), cert denied 456 US 916 (1982); Blizard v. Frechette 601 F. 2d 1217, 1220 (1st Cir. 1979).

In the majority of the 455 cases, the issue turns on whether a judge should sit through a trial or should be recused to protect the dignity and integrity of the judicial system. If recusal is appropriate, then usually a new judge steps in. As the Potashnick court pointed out: "The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify a judge much less burdensome than in times past." Id at 1112.

Thus, the ultimate issue is should

Judge Claiborne declare a mistrial rather than a simple recusal of himself until such time when a new judge can step in to finish the trial. A mistrial is such a drastic remedy that it is seldom invoked in connection with 455 cases. Will, decided six years after the amendment of 455(a) further interjected the "Rule of Necessity" into the balance of considerations available to a judicial officer. All things considered, Judge Claiborne should have continued the trial after his recusal or in the alternative, he should have finished it.

II

THE FAILURE TO APPLY OR EVEN CONSIDER FED.R.CRIM.P. RULE 25 BARS A RETRIAL.

Most often mistrials are prompted by prejudicial statements of counsel or a witness which cannot be adequately

corrected by a jury instruction. But other grounds are generally recognized including the death or serious illness of a party, a juror, the judge or counsel; the inability of the jury to arrive at a verdict, or the admission of evidence or other occurrence in the courtroom that is so prejudicial to one of the parties as to deprive him or her of a fair trial. None of these grounds apply to the instant case. Specifically, in anticipation of a judge's disability, Rule 25 of the Federal Rules of Criminal Procedure provides:

> "Rule 25.Judge;Disability. (a) DURING TRIAL. If by reason of death, sickness or other disability the judge before whom a jury trial has commended is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial" (emphasis added).

The issue then is whether the judge's indictment constituted a "disability" within the intendment of the rule.

The rule was developed in July 1966, after the Judicial Conference of the United States approved a recommendation of its Committee on Court Administration that provision be made for substitution of a judge who becomes "disabled" during trial, a problem occurring with greater frequency because of the increase in the number of long criminal trials (see Notes of Advisory Committee on Rules Red. R. Crim.P.U.S. Code Title 18).

United States v. Sartori 560 F. Supp. 427 (U.S.D.A. D. Maryland 1983), considered the meaning of "the term 'other disability'" in Rule 25 and determined it included a disability by reason of recusal. See Bennett v. United States,

285 F.2d 567, 572 (5th Cir. 1960), cert. denied, 366 US 911, 8 S. Ct. 1087, (1961). Other disabilities include retirement of the trial judge, Coleman v. U.S. 334 F.2d 558, 563 (C.A. 1964) and expiration of assignment to district Hvass v. Graven, 257 f2d I, (8th Cir. 1958) cert. denied, 358 U.S. 835.

In Sartori the district court held that defendant's trial on charges of alleged fraudulent interstate distribution of drugs was aborted without manifest necessity when the trial judge recused himself due to his involvement with the cancer society after trial had commenced. Thus, a second prosecution was bsrred by double jeopardy, where the trial court failed to provide counsel with a meaningful opportunity to offer alternatives.

In reading its decision the court stated:

> "....In determining whether the trial judge exercised sound discretion in declaring a mistrial, we must consider if there were less drastic alternatives to ending the trial. If less drastic alternatives than a mistrial were available, they should have been employed in order to protect the defendant's interest in promptly ending the trial and the Commonwealth's interests in rapid prosecution of offenders." (footnote omitted) (Emphasis supplied). See Harris v. Young, 607 F.2d 1081 at 1085 (4th Cir. 1979).

The court also noted that while the trial judge did consider the alternative in the event of a guilty verdict, of substituting a judge to sentence the defendant, which was rejected by defense counsel, he apparently did not give adequate consideration to the alternative, provided by Rule 25(a). Fed.R.Crim.P., of substituting a judge for himself during the trial itself.

In the instant case there was no legal requirement precluding the trial

judge from continuing the case, and neither the government attorney or defense counsel requested that the judge remove himself. As stated by the judge and as confirmed by the new acting judge, Judge Claiborne's decision was strictly a personal choice. No one was consulted, no alternatives were explored and no consideration was given to defendant. The case in process, U.S. v. Jaramillo, was a very simple case and only involved one defendant. If allowed to continue it probably would have concluded the next day. If postponed, another judge could have familiarized himself with the record of the trial in a couple of hours. Credibility of the witnesses was not in issue since the testimony of the government's witnesses was generally undisputed. The bulk of the live testimony was based on tape recordings and the

introduction of phone bills by custodian of records. Jury selection was the most time consuming aspect of the case.

In Sartori supra the mistrial was declared sua sponte on the first day of the trial. In the instant case it was declared on the third day, with the trial nearly concluded.

The Court of Appeals seems to believe that recusal of Judge Claiborne without the declaration of mistrial would not be sufficient insofar as no subsequent judge would be able to remove "the appearance of partiality concerning all prior rulings and all actions of the indicted judicial officer." Thus the Court held that Rule 25(a) did not provide Judge Claiborne with a practical or feasible alternative to the declaration of a mistrial.

If such a taint, in the view of the Court of Appeals, was so pervasive and so indelible that nothing short of a mistrial could cleanse it, then it is all the more erroneous for Judge Claiborne to start the Jaramillo trial. Long before the jury was impaneled, newspapers in Las Vegas were full of articles on the possibility of Judge Claiborne being involved with Conforte. Also the Grand Jury had already heard allegations of Judge Claiborne's alleged actions before the jury was sworn in the Jaramillo case. The "appearance of partiality," if any, was started before the first ruling, the first action of Judge Claiborne in the Jaramillo trial. And yet, without any thoughts for the double jeopardy consequences, the trial was started. The rest was history.

Petitioner now faces a second

confrontation with society in light of the Court of Appeals feeling that no other judge can step in or would want to step into a trial left by a judge of questionable moral character and integrity.

As Rule 25(a) suggests, Judge Claiborne should have recused himself and let another judge step in to continue the Jaramillo trial. The failure to apply or even consider Rule 25 bars a retrial of ESTELLA JARAMILLO.

CONCLUSION

Admittedly the instant case is one of first impression. However, there is absolutely no reason why the Government could not have considered and formulated a method of proceeding which would have prevented what transpired. The burden was clearly on the government and not on the Defendant. The Constitution, Rule 25, Fed.R.Crim.P. 38 USC 455(a) case law,

equity, the facts of the case and justice mandate that any further prosecution of ESTELLA JARAMILLO be barred by the doctrine of double jeopardy. To bar her retrial is to affirm the integrity of our judicial system to monitor itself while to retry ESTELLA JARAMILLO is to make a mockery of the ideals upon which this country was founded.

Respectfully submitted,

LAW OFFICES OF LLOYD A. CHARTON

By: Lloyd Charton
Lloyd A. Charton, Esq.
Attorney for Petitioner

APPENDIX

EXHIBIT "A"

Court of Appeal's Opinion

Affirming Lower Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 84-1091
	)	
vs.	)	D.C. No.
	)	CR LV 83-95 HEC
STELLA JARAMILLO,	)	
	)	O P I N I O N
Defendant-Appellant.	)	
	)	

ppeal from the United States District Court
for the District of Nevada
arry E. Claiborne, District Judge, Presiding,
Argued and submitted September 13, 1984

EFORE: MERRILL, ALARCON, and NELSON,
Circuit Judges.

ALARCON, Circuit Judge:

Estella Jaramillo appeals from the enial of her motion to bar her retrial.[1]

I

PERTINENT FACTS

Jaramillo was indicted by the Federal rand Jury for the District of Nevada, sitting n Las Vegas, for (1) aiding and abetting the

istributicn of a controlled substance in iolation of 18 U.S.C. § 2 and 21 U.S.C. 841(a)(1), and (2) conspiracy to istribute cocaine in violation of 21 U.S.C. 841(a)(1) and § 846.

Trial began on December 6, 1983, before istrict Court Judge Harry E. Claiborne. The ury was selected and sworn on the following ay. Later the same day, the jury heard pening statements, and testimony of three f the government's witnesses. During the orning session on December 8, the government egan the direct examination of its fourth itness. At the conclusion of the noon ecess, Judge Claiborne invited Jaramillo's ttorney and the government prosecutor into is chambers and informed counsel that he had ust received word that he had been indicted y the Federal Grand Jury for the District

f Nevada sitting in Reno, and that he [didn't] have any alternative but to declare mistrial in this case."[2] Jaramillo's ttorney made no comment nor did he suggest hat the trial judge consider recusing imself so that the trial could proceed efore a different judge.

Thereafter, Judge Claiborne commenced he afternoon session by making the following tatement to the jury:

> Ladies and gentlemen of the jury, I regret to advise you that I have been advised that I have been indicted by the grand jury in Reno. By reason of that fact -- it would be inappropriate for anybody to preside in a trial who is under indictment. For that reason I am declaring a mistrial in this case.

I thank you for the inconvenience of serving as a juror, and I regret the circumstances which cause this trial to be delayed. So, you are excused with my thanks.

After the jury left the courtroom, Judge laiborne ordered that the matter be set for rial on February 13, 1984. The prosecutor hen stated: "Thank you, your honor." Judge laiborne replied, "I am sorry. I know you ere ready to go, but I can't help it. Court ill be in recess." Again, Jaramillo's ounsel remained silent and failed to propose n alternative to the declaration of a istrial.

On the date Judge Claiborne declared a istrial, he was the only active judge hearing ases in Las Vegas, Nevada. Senior Judge oger D. Foley handled a limited load of

vil cases.

On January 12, 1984, Jaramillo filed a tion to bar retrial on double jeopardy ounds because "[t]here was no manifest cessity for declaring a mistrial. In her ints and authorities filed in support of is motion, Jaramillo asserted for the rst time that "[n]o alternatives to the strial were discussed or explored." ramillo also argued that "[d]efense unsel was never consulted or given an portunity to object or suggest ternatives." Oral argument on Jaramillo's tion was heard by Judge Foley on rch 19, 1984. He denied the motion on rch 20, 1984. On the same date, ramillo's motion for a stay pending peal was granted by Judge Foley.

II

ISSUE

We must decide whether the unique circumstances which confronted Judge Claiborne as the result of being indicted while presiding over a criminal trial constituted a manifest necessity for the discharge of the jury and the declaration of a mistrial.

In seeking reversal, Jaramillo contends that the indictment of Judge Claiborne did not establish "the high degree of necessity which would warrant a declaration of mistrial." We disagree.

III

ANALYSIS

A. Manifest Necessity

The double jeopardy clause of the fifth amendment of the Constitution protects an

accused's "valued right to have his trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497,503 (1978), quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). To prevent unfairness to the accused, the prosecutor is generally entitled to only one opportunity to require the accused to stand trial. Arizona, 434 U.S. at 504-05. Jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 29 (1978); United States v. Williams, 717 F.2d 473, 475 (9th Cir. 1983). It is clear from this record that jeopardy had already attached before a mistrial was declared.

Even after jeopardy attaches, however, reprosecution is not barred if the trial was terminated because of "manifest necessity." Arizona, 434 U.S. at 505; Williams, 717 F.2d at 475. The manifest necessity standard was

first announced by the Court in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824):

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent

circumstances, and for very plain and obvious causes . . . .

Judge Claiborne made no finding of manifest necessity before declaring a mistrial. He stated only that he believed it would be "inappropriate" for him to proceed. He also did not discuss the possible double jeopardy consequences of his action. In Arizona v. Washington, 434 U.S. 497, 516-17 (1978), the Court held that the trial court's failure to make an explicit finding of manifest necessity was not constitutionally defective. A reviewing court may determine from the record whether the mistrial was required by manifest necessity.

The degree of deference to be accorded the trial judge's determination of manifest necessity varies with the circumstances of

each case. Arizona, 434 U.S. at 507-10; Williams, 717 F.2d at 475.

In Arizona v. Washington, 434 U.S. at 508-10, the Court described the standard of review as a continuum with strictest scrutiny applied to the court's determination where the accused claims that the mistrial was caused intentionally by the prosecution and, at the other end, great deference accorded the trial judge's conclusion that a mistrial is required because of a deadlocked jury. In Arizona, the trial court declared a mistrial after defense counsel made an improper opening statement. The Court granted this determination "great deference" so as not to impede the trial judge in the performance of his duty to protect the integrity of the trial. Id. at 513-14. Even where a decision is given

great deference, however, this court may overturn it if it is irrational or irresponsible. Id. at 514.

The record here does not reveal that intentional prosecutorial misconduct caused the mistrial. The United States Attorney's Office for the District of Nevada which prosecuted Jaramillo was recused from the investigation of Judge Claiborne in June, 1981. The Public Integrity Section of the Department of Justice presented the evidence against Judge Claiborne to the grand jury. Thus, we are not required to review this record under a strict scrutiny standard.

A trial judge's determination that it is inappropriate for him to continue to preside over a criminal case after he has been indicted is arguable analogous to the

judge's determination of possible juror bias at issue in Arizona. In both situations, an overly rigid standard of review might cause a judge to proceed with the trial of a case where the integrity of the entire proceeding was seriously clouded in order to avoid declaring a mistrial which might result in a double jeopardy claim. Whether deference or great deference is applied to Judge Claiborne's declaration of a mistrial, we reach the same result in this matter. The extraordinary circumstances of this case required that a mistrial be declared.

Jaramillo argues that the mistrial was not a necessity because the indictment of a presiding judge does not disqualify him or her from completing the case.

In denying Jaramillo's motion to bar retrial, Judge Foley apparently concluded

that Judge Claiborne was required to disqualify himself under 28 U.S.C. § 455(a). That statute provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his partiality might reasonably be questioned." 28 U.S.C. § 455(a)(1982). The purpose of section 455(a) is to protect the courts against even the appearance of impartiality. United States v. Poludniak, 657 F.2d 948, 954 (8th Cir. 1981), cert. denied, 455 U.S. 940 (1982) citing Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980).

Recusal is required under Section 455(a) if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.

Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984); Trotter v. International Longshoremen's & Warehousemen's Union, 704 F.2d 1141, 1144 (9th Cir. 1983). Section 455(a) puts the judge under a self-enforcing obligation to recuse himself where legal grounds exist for disqualification. Trotter, 704 F.2d at 1144.

Judge Claiborne properly concluded that a reasonable person with knowledge of all the facts pertaining to the nature of the indictment would question the ability of a judge facing prosecution to remain impartial as the presiding jurist in a criminal proceeding.

Jaramillo contents, however, that her interest in having her trial completed outweighed the judge's duty to disqualify himself under section 455(a). Jaramillo

argues that under the "Rule of Necessity," a judge must decide a case in which he or she has a personal interest if the parties otherwise would be denied a forum, citing United States v. Will, 449 U.S. 200, 213 (1980). The Rule of Necessity was applied in Will because a contrary holding would have denied the parties in that matter any forum because all federal judges were similarly interested in the outcome of the case. Id. Jaramillo, however, was not denied the right to any forum by Judge Claiborne's disqualification. Moreover, since Will, Congress amended section 455 to do away with the "duty to sit" doctrine which had previously required a judge to hear a case absent a clear demonstration of bias or prejudice. United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), cert. denied, 456

U.S. 916 (1982); Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979).

B. Rule 25(a)

Jaramillo asserts that prior to exercising his discretion to declare a mistrial, Judge Claiborne was obligated to consider less drastic alternatives. Specifically, she argues that Judge Claiborne was required by Rule 25(a) of the Federal Rules of Criminal Procedure to consider the alternative of continuing further proceedings so that another judge could determine if the trial could be completed.

Rule 25(a) of the Federal Rules of Criminal Procedure provides:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable

to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

As set forth above, Rule 25(a) provides that if by reason of a "disability" a judge is unable to proceed with a trial, another judge may proceed with the trial upon certifying that he has familiarized himself with the record of the trial. Rule 25(a) does not define the term "disability." We note, however, that the rule expressly applies to a disability to proceed with the trial brought about by death or sickness. Neither death nor a disabling sickness necessarily affects the integrity of all prior proceedings in the trial. Under such

circumstances, if the record is free of any problems caused by the judge's disability which affects the integrity of the trial to date, another judge who has familiarized himself with the record may readily take over and finish the trial. Where, as here, the "disability" directly implicates the character and integrity of the judge especially in relation to criminal proceedings, the designation of another judge would not remove the appearance of partiality concerning all prior rulings and all actions of the indicted judicial officer, from the inception of the trial. To establish the appearance of justice under such extraordinary circumstances, a new judge would necessarily be compelled to begin the trial anew. It is our view that Rule 25(a) did not provide Judge Claiborne

with a practical or feasible alternative to the declaration of a mistrial in light of the historically unique problems he faced as a judge indicted on criminal charges which called into question his moral fitness to sit as a judge. Judge Claiborne did not err in failing to invoke *sua sponte* the procedure set forth in Rule 25(a).

The order denying the motion to bar a retrial is AFFIRMED.

FOOTNOTES

[1] The denial of a motion to bar retrial on the basis of double joepardy is a final decision over which this court has appellate jurisdiction under 28 U.S.C. § 1291. Abney v. United States, 431 U.S. 651, 662 (1977); United States v. Williams, 717 F.2d 473, 474-75 (9th Cir. 1983).

[2] The proceedings in chambers were reported. The reporter's transcript reflects the following colloquy:

> I regret to advise you that I have just received word that the Reno Grand Jury has indicted me on seven counts, so I didn't have any alternative but to declare a mistrial in this case. I am sorry. I wanted you to know in advance that that is what I intend to do.

MS. STEWART: Yes, your honor.

THE COURT: So, get the jury in.

We also note that neither the Supreme Court nor this court has ruled that the Constitution requires the trial court to consider on the record the alternatives to mistrial nor to conduct a hearing before discharging the jury. In the same year that Arizona v. Washington was decided, the Supreme Court remanded a Second Circuit case which had held that consideration on the record was required. See United States v. Grasso, 552 F.2d 46 (2d Cir. 1977), vacated and remanded, 438 U.S. 901 (1978). On remand, the Second Circuit held that trial court findings on alternatives to dismissal were "desirable" but "not constitutionally mandated." United States v. Grasso, 600 F.2d 342, 343 (2d Cir. 1979), quoting Arizona,

434 U.S. at 516-17. See also United States v. Lynch, 598 F.2d 132, 136 (D.C. Cir. 1978), cert. denied, 440 U.S. 939 (1979) (court troubled by trial court's failure to give counsel opportunity to suggest alternatives to mistrial but found no abuse of discretion).

EXHIBIT "B"

Order Denying Motion

to Bar Retrial

B1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

UNITED STATES OF AMERICA, Plaintiff, VS. ESTELLA JARAMILLO, et al., Defendant(s).	Criminal-LV 83-95, HEC MINUTES OF THE COURT Dated: March 20, 1984

PRESENT:
THE HONORABLE Roger D. Foley
UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: Preston Blueitt, Jr. REPORTER: None Appearing

U.S. ATTORNEY BY: None Appearing

COUNSEL FOR DEFENDANT(S): None Appearing

DEFENDANT(S) IS/ARE NOT PRESENT:

MINUTE ORDER IN CHAMBERS: XXXXX

IN COURT PROCEEDINGS:

IT IS ORDERED that the Motion to Bar Retrial of Defendant Jaramillo pursuant to the United States Constitution, Fifth Amendment, Barring Double Jeopardy (#97), filed January 12, 1984, is denied.

CLERK, U.S. DISTRICT COURT

By /s/

EXHIBIT "C"

TRANSCRIPT

December 8, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS	)	CR LV 83-95 HEC
	)	
ESTELLA JARAMILLO,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE HARRY E. CLAIBORNE,

CHIEF DISTRICT JUDGE

PARTIAL TRANSCRIPT OF JURY TRIAL

APPEARANCES:

FOR THE PLAINTIFF:

VALERIE STEWART, ESQ.
Assistant U. S. Attorney
300 Las Vegas Boulevard So.
Las Vegas, NV 89101

FOR THE DEFENDANT:

ROBERT HANTMAN, ESQ.
501 Fifth Avenue
New York, New York 10017

THURSDAY, DECEMBER 8, 1983

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 8, 1983, 1:30 P.M.

(In Chambers.)

THE COURT: I regret to advise you that I have just received word that the Reno Grand Jury has indicted me on seven courts, so I don't have any alternative but to declare a mistrial in this case. I am sorry. I wanted you to know in advance that that is what I intend to do.

MS. STEWART: Yes, your Honor.

THE COURT: So, get the jury in.

(In open court.)

THE COURT: Call the roll of the jury.

(Jury roll called - all present)

THE CLERK: All present, your Honor.

THE COURT: Ladies and gentlemen of the jury, I regret to advise you that I have been advised that I have been indicted by a grand

jury in Reno. By reason of that fact -- It would be inappropriate for anybody to preside in a trial who is under indictment. For that reason I am declaring a mistrial in this case.

I thank you for the inconvenience of serving as a juror, and I regret the circumstances which cause this trial to be delayed. So, you are excused with my thanks.

(Jury exits the courtroom.)

THE COURT: Let the record show that this case will be reset for February 13 at the hour of 9:30 a.m.

MS. STEWART: Thank you, your Honor.

THE COURT: I am sorry. I know you were all ready to go, but I can't help it. Court will be in recess.

---o0o---

I certify that the foregoing is a correct transcript from the record of

proceedings in the above-entitled matter.

/s/ Paul E. DeGagne 1/26/84

PAUL E. DeGAGNE, CSR Date

EXHIBIT "D"

Order Granting Stay

Pending Appeal

LLOYD A. CHARTON, ESQ.
17480 East 17th Street
Tustin, California 92680
(714) 669-1127

JAMES J. JIMMERSON & ASSOCIATES
Thomas W. Davis, II
1407 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 382-3970
Attorneys for Defendant Estella Jaramillo

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. ESTELLA JARAMILLO, et al., Defendant.	ORDER FOR STAY PENDING APPEAL

The Court having reviewed and considered the Motion for Application for Stay Pending Appeal submitted by Defendant Estella Jaramillo this 19th day of March, 1984, based upon all pleadings and papers on file herein and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Estella Jaramillo's Motion for Application for Stay Pending Appeal shall be and hereby is granted.

DATED this 20th day of March, 1984.

/s/
U. S. DISTRICT JUDGE

Submitted by,

JAMES J. JIMMERSON & ASSOCIATES

By: /s/ Thomas Davis II
Thomas W. Davis, II
1407 Valley Bank Plaza
Las Vegas, Nevada 89101
Attorneys for Defendant Estella Jaramillo

EXHIBIT "E"

Findings of Fact and

Conclusions of Law of

U.S. District Court

E1

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-o0o-

UNITED STATES OF AMERICA, Plaintiff, vs. ESTELLA JARAMILLO, et al., Defendant.	Cr. LV 83-95, LDG FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Based upon the motion of Defendant JARAMILLO for a stay pending application for writ of certiorari to the United States Supreme Court, and good cause appearing therefor, the Court finds that:

1. Defendant JARAMILLO was indicted on July 20, 1983, with others, for violations of Title 21, United States Code, Section 841(a)(1) and Title 21, United States Code, Section 846.

2. On December 6, 1983, the trial of Defendant JARAMILLO began, in Las Vegas, Nevada, the Honorable Harry E. Claiborne presiding.

3. On December 8, 1983, during the trial, Judge Claiborne declared a mistrial due to his own indictment on criminal charges. The matter was set for re-trial in accordance with the Speedy Trial Act.

4. On January 12, 1984, Defendant JARAMILLO filed a Motion to Bar Retrial on the grounds of double jeopardy. The retrial was stayed pending a hearing on the motion. On March 19, 1984, the Motion to Bar Retrial was argued before the Honorable Roger D. Foley.

5. On March 20, 1984, Judge Foley issued an Order denying the Motion to Bar Retrial. Defendant JARAMILLO filed a

Motion for a Stay Pending Appeal, which was granted, and filed an appeal to the Ninth Circuit.

6. On September 13, 1984, a panel of the Ninth Circuit heard oral argument on Defendant JARAMILLO's appeal. On October 23, 1984, the Ninth Circuit issued its decision denying the appeal of Defendant JARAMILLO.

7. The matter is now set for re-trial on December 12, 1984. At calendar call on December 6, 1984, Lloyd Charton, counsel for Defendant JARAMILLO, filed with this Court a Motion for Stay Pending Application for a Writ of Certiorari To The United States Supreme Court.

8. The Government has no objection to the motion of Defendant JARAMILLO.

9. A petition for writ of certiorari to the United States Supreme Court is an

interlocutory appeal.

10. Delay resulting from an interlocutory appeal is excluded in computing the time within which a trial must commence. Title 18, United States Code, Section 3161(h)(1)(E).

CONCLUSIONS OF LAW

Based upon the facts set out herein and the Motion of Defendant JARAMILLO for a Stay Pending Application for a Writ Of Certiorari To The United States Supreme Court, the Court hereby concludes that:

1. The continuance of the trial date of December 12, 1984, is excludable under the Speedy Trial Act, Title 18, United States Code, Section 3161(h)(1)(E).

ORDER

IT IS THEREFORE ORDERED that the December 12, 1984, trial setting is

vacated.

DATED this 6 day of December, 1984.

/s/ Lloyd D. George
LLOYD D. GEORGE
United States
District Judge